John Morrell & Co.; United Brands; John Morrell & Co. and United Brands, Joint and/or Single Employer and/or Joint Respondents *and* United Food and Commercial Workers International Union, AFL–CIO, CLC. Cases 13–CA–23099 and 13–CA–27288

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On July 13, 1989, the General Counsel of the National Labor Relations Board issued an amended complaint alleging that the Respondents had violated Section 8(a)(1), (3), and (5) of the Act. The Respondents filed an answer admitting in part and denying in part the complaint allegations, and raising certain affirmative defenses.

On March 5, 1990, the Respondents filed a Motion for Summary Judgment with supporting memorandum and exhibits, contending that the cases should be dismissed because the underlying charges are barred by Section 10(b).[1] On March 14, 1990, the Board issued an order transferring proceeding to the Board and a Notice to Show Cause why the motion should not be granted.[2] The General Counsel and the Charging Party filed responses, and the Respondents filed a reply to those responses.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

This case concerns charges arising out of Respondent Morrell's closing of certain plants in 1982 and reopening them in 1983. Although a charge was filed in 1983 concerning the closing and reopening of one of those plants, that charge was withdrawn a few months later by the Charging Party (the Union) with the approval of the Regional Director. Several years later, however, the Union came into the possession of documents arguably indicating that the Respondents had intended all along (contrary to their representations to the Union and to the Board's Regional Office investigating the charge) to close and reopen the plants in order to get rid of the Union and to avoid their bargaining and contractual responsibilities. Armed with those ''smoking gun'' documents, the Union sought and received permission to reinstate its 1983 charge, and also filed a new charge, expressly alleging that the Respondents had closed and reopened the plants as part of their unlawful scheme to oust the Union and avoid their bargaining responsibilities.

The Union and the General Counsel assert that Section 10(b) does not bar the complaint because the Respondents fraudulently concealed their true intentions in closing and reopening the plants. The Respondents contend that, even assuming Morrell attempted to conceal its real motive, the Union nevertheless knew or should have known of the existence of the allegedly unlawful scheme, that the General Counsel was aware of the operative facts at the time the 1983 charge was withdrawn, and therefore that Section 10(b) bars this action. The Respondents also assert that the issue of notice to the Union has been decided adversely to the Union in related district court litigation, and that collateral estoppel consequently bars relitigation of that issue here. For the reasons discussed below, we agree with the Respondents that Section 10(b) bars these proceedings.[4] Accordingly, we shall grant the Motion for Summary Judgment and dismiss the complaint.

I. BACKGROUND[5]

A. *The Contract Negotiations*

Respondent John Morrell & Co. (Morrell) is in the meatpacking business.[6] The Union and Morrell have been parties to a series of collective-bargaining agreements dating back at least to the 1940s. Those agreements, known as Master Agreements, applied to Morrell plants throughout the United States.

Shortly after the execution of the 1979–1982 Master Agreement, the Respondent attempted to persuade the Union to modify the wage provisions of the agreement.

[1] The Respondents advance a number of other arguments in support of their motion. Because of our disposition of the 10(b) issue, we need not address those arguments.

[2] The Charging Party filed a motion to strike and deny the Motion for Summary Judgment as untimely filed. We deny the Charging Party's motion. Sec. 102.24(b) of the Board's Rules and Regulations, on which the Charging Party relies, applies only in cases in which the complaint issues on or after October 16, 1989. Because the amended complaint in this case issued July 13, 1989, the Respondent's motion is not untimely under Sec. 102.24(b). The Charging Party's remaining arguments in support of its motion are also without merit.

[3] The Respondents also filed a motion for an order requiring the Union and the General Counsel to return to the Respondents certain allegedly privileged documents, striking references to the documents in those parties' briefs, and requiring those parties to delete such references in other material in their possession. The General Counsel and the Union filed oppositions to the Respondents' motion, and the Respondents filed a reply.

The documents in question, according to the General Counsel and the Union, are evidence of a course of action on the part of Respondent Morrell which was designed to rid Morrell of the Union. As we explain below, we assume for the purposes of deciding this summary judgment motion that such an unlawful course of action existed. The documents at issue therefore are not necessary to the disposition of this case. For that reason, we shall grant the Respondents' motion to strike and to retrieve the documents. Accordingly, we need not and do not address the arguments of the parties concerning the propriety of the General Counsel's use of the documents.

[4] Concerning the Respondents' collateral estoppel argument, we find that a substantial question of material fact exists regarding whether the issue of notice to the Union was decided in the district court proceeding. The collateral estoppel allegation therefore is inappropriate for decision on a motion for summary judgment.

[5] The material facts, which follow, are not in dispute. Accordingly, this case is appropriate for summary judgment. See, e.g., *General Split Corp.*, 284 NLRB 418 (1987).

[6] Respondent United Brands is Morrell's parent company. For the sake of brevity, this decision will refer to the Respondents simply as ''Morrell.''

When its attempts failed, the Respondent in late 1981 and early 1982 notified the Union that it would permanently close several plants, including those at Arkansas City, Kansas (Ark City), and Memphis, Tennessee. The Ark City and Memphis plants were closed in June and July 1982, respectively. Pursuant to the terms of the Master Agreement, Morrell paid some $19 million in closing benefits to employees who were terminated as the result of all the plant closings.

During the summer and fall of 1982, the Union and Morrell conducted negotiations for a new Master Agreement. Morrell proposed, and the Union agreed, that references to the closed plants, including Ark City and Memphis, be deleted from the ''Recognition and Coverage'' clause of the new agreement.[7] Morrell also proposed, first, to delete from the new agreement, and later, to modify, sections 100 and 101 of the existing contract. Section 100 provides that, in the event of a plant closing, Morrell will not, within 5 years, obtain production of the products previously produced in the closed plant by subcontracting production to a third party either within the closed plant or at a facility within 100 miles of that plant. No changes were made in section 100 in the 1982 negotiations. Section 101 provided that, under specified conditions, new plants would be governed by the Master Agreement, except for those established in the Southeast, Southwest, or Northeast. On September 9, the parties agreed to modify section 101 through a side letter specifying that the Ark City plant would be considered to be in the Southwest, and that the Memphis plant would be in the Southeast. On September 10 the parties signed another side letter stating that nothing in the Master Agreement (executed the same day) would preclude Morrell from reopening previously closed plants, including those at Ark City and Memphis, and that if those plants were reopened, nothing in the agreement required the reopened plants to be subject to the agreement.

While the negotiations were going on, the Union issued a handbill to its members describing Morrell's bargaining proposals, including those for wage reductions. The handbill, which is dated September 3, 1982, contained the following section concerning Morrell's proposal to delete sections 100 and 101:

> Eliminate Contract Sections 100 & 101
>
> This Company demand may very well turn out to be one of the most devastating proposals submitted by Morrell.
>
> Essentially Sections 100 and 101 of the contract deal with subcontracting and new packing plant operations. Section 100 states that when the Company closes down or substantially terminates production operations at any plant, division or department of a plant covered by the Master Agreement, the Company will not by sale, contract, lease, or other similar arrangement secure production from the plant for 5 years after the close down.
>
> Morrell negotiators are demanding that this language not apply to the closed down plants at Arkansas City, Memphis, Cincinnati, El Paso. On August 31st *it became clear to us that Morrell wants language 100 and 101 eliminated because they intend to start operations at some or all of the closed plants.* [Emphasis added.] Obviously the wages would be $5.00, $6.00 or $7.00 an hour with little to no benefits. This of course would lead to the destruction of the Sioux Falls and E. St. Louis facilities. On this issue we are talking *jobs*, and *job security. A contract means nothing if the Company can transfer the work to a low wage operations.* [Emphasis in original.]

B. *The Reopening of the Ark City Plant*

Morrell reopened the Ark City plant on March 23, 1983. It did not recognize the Union as the representative of the employees, and it did not apply the terms of the 1982 Master Agreement. Instead, it set wages at $5 per hour and reduced or eliminated most benefits that had existed before the plant was closed. Morrell informed the Union that the decision to reopen the plant was based on economic conditions that had changed since the plant was closed.

C. *The 1983 Charge*

On March 30, 1983, the Union filed its charge in Case 13–CA–23099. The charge recited that the Ark City plant had been closed after the Union had refused to agree to Morrell's demands for wage reductions; that Morrell had reopened the plant but had refused to recall former unit employees or to recognize the Union, and had unilaterally changed the employees' terms and conditions of employment without bargaining with the Union; and that Morrell had engaged in the ''above conduct'' in order to discriminate against union members and to avoid its collective-bargaining obligations, all in violation of Section 8(a)(1), (3), and (5).

In the course of its investigation of the charge, the Regional Office received statements of position from Morrell and from the Union. In a letter dated May 5, 1983, counsel for Morrell represented to the Board's field examiner that the closing of the Ark City plant was intended to be, and was, a permanent shutdown. In a second letter, dated May 18, the same attorney represented to the Board's attorney that the closing of the Ark City plant was permanent, that Morrell had so informed the Union, and that the plant was reopened because of a combination of external economic factors,

[7] Removal of permanently closed plants from succeeding contracts was standard practice in the industry.

not because Morrell was trying to get rid of the Union. The second letter refers to an affidavit from Morrell's senior vice president, which avers that during contract negotiations, Morrell informed the Union that it had no present intention of reopening any of the closed plants, but that it wanted to have the flexibility to do so in the future. The affidavit also states that Morrell began to consider reopening a plant (not necessarily Ark City) in November 1982 because of changed economic conditions, and did not decide to reopen Ark City until January 1983.

On the basis of its investigation, the Regional Office wrote a memorandum to the Board's Division of Advice,[8] setting forth at length and in detail the Region's understanding of the facts in the case, the parties' positions, the issues presented, and its recommendations.[9] The memorandum states that, according to the Regional Office: ''The closing was viewed as a temporary closing in light of Morrell's unsuccessful attempts to negotiate lower labor costs at Ark City before it closed the plant and its apparent intent to reopen the plant if it could do so without the Master Agreement revealed to the International Union during the September bargaining sessions.'' The memorandum recommends that a complaint issue, alleging that Morrell violated Section 8(a)(5) by refusing to recognize and bargain with the Union at the reopened plant, and by unilaterally changing terms and conditions of employment. It also indicates that the Regional Office was uncertain about the merits of the allegation that Morrell had violated Section 8(a)(3) by refusing to rehire former unit employees.

On June 30, 1983, Morrell voluntarily recognized the Union at Ark City. On July 25, while Case 13–CA–23099 was being considered by the Division of Advice, the Union sent a letter to the Regional Director informing him that the parties had resolved their dispute and had reached agreement on a collective-bargaining agreement, and asking that the charge be withdrawn. By letter dated September 8, the Regional Director informed Morrell that he had approved the Union's request and that the charge had been withdrawn.[10]

D. *The District Court Actions*

In late 1983 and early 1984, former employees at the Ark City and Memphis plants filed lawsuits in Federal district courts against Morrell and the Union. *Aguinaga v. John Morrell & Co., et al.*, No. 83–1858 (D. Kan. 1983); *Cummings v. John Morrell & Co., et al.*, No. 84–2062–HA (W.D. Tenn. 1984). The plaintiffs in both cases alleged that Morrell had never intended to close the plants permanently, but rather closed and reopened them in order to avoid both its contractual and statutory obligations. The plaintiffs also alleged that the Union violated its duty of fair representation in its dealings with Morrell; the plaintiffs in *Aguinaga* alleged, in fact, that the Union had engaged in a conspiracy with Morrell to conceal the true purpose of the closing and reopening of the Ark City plant.

During discovery in the *Aguinaga* litigation, Morrell resisted the production of a number of documents on the ground that they were protected from disclosure by either the attorney-client privilege or the attorney ''work product'' doctrine. In a lengthy opinion dated April 4, 1986, the magistrate remarked that the plaintiffs had alleged that Morrell had closed Ark City with the intention of reopening it under more favorable conditions, and of avoiding its legal and contractual obligations, and that the Union had conspired with Morrell to defraud the plaintiffs and to conceal Morrell's true, and unlawful, intentions. The magistrate then characterized the documents, which he had reviewed in camera, as the best, and only available, evidence for ascertaining the parties' intentions concerning the plant closing, and ordered that the documents be produced. (The trial court reversed the magistrate's ruling. The documents were produced to the plaintiffs only in April 1987, after Morrell had settled the case; the plaintiffs made four of the documents available to the Union, which had not settled, in June 1987.)

The *Aguinaga* plaintiffs' case against the Union was tried to a jury in June 1988. The jury returned a verdict for the plaintiffs on the issue of the Union's liability; trial has not yet been held on the issue of damages. Both the Union and Morrell have settled the Cummings litigation with the plaintiffs there.

E. *The 1987 Charge*

Armed with the ''smoking gun'' documents, the Union on October 23, 1987, filed its original charge in Case 13–CA–27288. That charge, as amended, alleges that Morrell in 1981 and 1982 developed an unlawful plan to rid itself of the Union and of its obligations under the Master Agreement. The charge also alleges that the plan involved closing the covered plants, terminating employees, removing the plants from coverage under the Master Agreement, and reopening the plants under changed conditions. The charge further alleges that the plan was fraudulently concealed from the Union until June 1987. The Union also filed a motion to reinstate its withdrawn 1983 charge on October 23, 1987; the charge was reinstated by the Regional Director on February 2, 1989.

[8] The letter was incorrectly dated June 3, 1982. The year should have been 1983.

[9] The memorandum was obtained by Morrell pursuant to a Freedom of Information Act request.

[10] Morrell also reopened its Memphis plant in the fall of 1983. No charge was filed at that time concerning the closing and reopening of the Memphis facility.

II. ANALYSIS AND CONCLUSIONS

Section 10(b) provides that ''no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge[.]'' The unfair labor practice at issue here is the closing and *reopening* of the Ark City plant.[11] The Union's charge in Case 13–CA–23099 was filed a week after the reopening of the plant in March 1983, but was withdrawn in September of that year, and the Union did not request that it be reinstated until 1987. As a general rule, a withdrawn charge may not be reinstated after the 6-month period prescribed by Section 10(b).[12] The charge in Case 13–CA–27288 was filed more than 4 years later, in October 1987. Normally, then, both charges would be barred by Section 10(b).

The General Counsel and the Union argue, however, that these are not normal circumstances. They contend that, because Morrell fraudulently concealed from the Union the nature of the closing of the Ark City plant, the Union did not receive notice of the operative facts in this case until June 1987, when it came into possession of the ''smoking gun'' documents in the course of the Aguinaga litigation. They further contend that Morrell misrepresented the nature of the plant closing to the Regional Office during its investigation of the charge in Case 13–CA–23099, and consequently that the Regional Director's approval of the withdrawal of that charge did not bar its reinstatement in 1987.[13] We disagree.

The parties agree that the 10(b) period does not begin to run until the charging party receives clear and unequivocal notice—either actual or constructive—of the acts that constitute the alleged unfair labor practice,[14] i.e., until the aggrieved party knows or should know that his statutory rights have been violated.[15] As a corollary—and a fortiori—when a party deliberately misrepresents or conceals from another the operative facts concerning its actions so that the other party is unable, even through the exercise of due diligence, to discover those facts, the 10(b) period does not begin to run until the deceived party obtains the relevant facts.[16]

Applying the foregoing legal standards to the facts of this case, we find, contrary to the Union and the General Counsel, that the Union had clear and unequivocal notice by late March 1983, of facts from which it should have known that Morrell had closed and reopened its Ark City plant as part of a plan to rid itself of the Union and its contractual responsibilities, and therefore was required to file any charge related to those actions within 6 months thereafter. Thus, it is undisputed that the Union knew (1) that Morrell had requested reductions in the contractual wage rates applicable to the Ark City plant and other facilities, and had threatened to close plants if the Union did not agree to such reductions; (2) that when the Union rejected its request for wage cuts, Morrell closed several plants, including Ark City, ostensibly on a permanent basis; (3) that Morrell thereafter bargained for, and the Union agreed to, the deletion of references to the closed plants from the 1982 Master Agreement and to a side letter stating that nothing in that agreement would preclude Morrell from reopening the closed plants in the future or would require Morrell to apply the contract terms at any reopened plants; and (4) that Morrell, a few months later, reopened the Ark City plant but refused to apply the terms of the Master Agreement (or even, initially, to recognize the Union) at that facility. Short of an outright confession from Morrell's top management, it is difficult to imagine what other evidence the Union could have needed before it would have reasonably been on notice that Morrell's actions evinced an unlawful course of action designed to get rid of the Union.[17] Indeed, the Union's September 3, 1982 handbill contains the statement, ''On August 31st *it became clear to us that Morrell wants language 100 and 101 eliminated because they intend to start operations at some or all of the closed plants*.'' (Emphasis added.) That language indicates that, whatever Morrell had told the Union concerning the permanency of the plant closings, long before the plants actually were reopened the Union suspected that the closings might be only temporary.[18] Once those

[11] The closing of the plant, alone, even if done for antiunion motives, would not have violated the Act unless it had been done with the intention of chilling unionism in Morrell's other facilities. *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). Thus, not until the plant was reopened, and the sham nature of the closing revealed, did an arguably unlawful act take place and a cause of action arise. *Southern Plasma Corp.*, 242 NLRB 1223, 1227 (1979), modified on other grounds 626 F.2d 1287 (5th Cir. 1980). The 10(b) period thus began to run only when the Ark City plant reopened, not in 1982, when it was closed. Id.

[12] *Winer Motors*, 265 NLRB 1457 (1982). See also *Ducane Heating Corp.*, 273 NLRB 1389, 1390 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986).

[13] See *Kanakis Co.*, 293 NLRB 435 (1989).

[14] See, e.g., *Southern California Edison Co.*, 284 NLRB 1205, 1209 (1987). The burden of establishing such notice is on the proponent of the 10(b) defense. *Pennsylvania Energy Corp.*, 274 NLRB 1153, 1155 (1985).

[15] *American Thoro-Clean*, 283 NLRB 1107, 1118 (1987); *Carpenters (Skippy Enterprises) v. NLRB*, 532 F.2d 47, 53 (7th Cir. 1976).

[16] *Barnard Engineering Co.*, 295 NLRB 226, 227 (1989); *Edwin R. O'Neill, Ltd.*, 288 NLRB 1354, 1355–1356 (1988); *Strawsine Mfg. Co.*, 280 NLRB 553 (1986); *Burgess Construction*, 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979).

[17] We assume, for the purposes of ruling on this motion, that such an unlawful scheme did, in fact, exist, and that Morrell deliberately misrepresented and concealed its true motive in closing and reopening the plants from the Union and the General Counsel.

[18] The Union argues that its 1982 handbill does not establish contemporaneous knowledge on its part of Morrell's unlawful scheme. In this regard, the Union relies on the testimony of Union Vice President Lewie Anderson, long after the plants were reopened, to the effect that he subjectively had not suspected at the time he drafted the handbill that Morrell was thinking of reopening the plants itself, but rather that he thought Morrell would resume operations under a subcontractor. The Union's argument is misplaced. We do not find, on the basis of the handbill, that the Union actually knew of Morrell's

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suspicions had been confirmed by Morrell's reopening of Ark City, the Union should have been able to infer Morrell's unlawful scheme. That it did not, in fact, make the connection does not toll the running of the 10(b) period.[19]

We also find that Morrell's misrepresentations to the Regional Office do not toll the running of the 10(b) period. Although Morrell informed the Regional Office that the Ark City plant closing was intended to be permanent, and was done for economic reasons, the Regional Director's memorandum to the Division of Advice indicates that the Regional Office understood that the character of the closing—whether permanent or temporary—was an issue in the case. The Regional Office also apparently saw through Morrell's charade. It viewed the Ark City closing ''as a temporary closing in light of Morrell's unsuccessful attempts to negotiate lower labor costs at Ark City before it closed the plant and its apparent intent to reopen the plant if it could do so without the Master Agreement revealed to the International Union during the September bargaining sessions.'' Moreover, the Regional Office recommended issuing a complaint in Case 13–CA–23099. It did not dismiss the charge for lack of evidence, but instead granted the Union's request to withdraw its charge. Thus, there is no basis for finding that Morrell's misrepresentations interfered with the General Counsel's decision to approve the withdrawal of the charge.[20]

Finally, even if we were to assume that, because of Morrell's misrepresentations, the Union was not constructively on notice of all the operative facts when it filed its 1983 charge, we would find that it certainly should have known that Morrell had an illegal objective in closing its plants when the magistrate in *Aguinaga* ruled that Morrell's ''smoking gun'' documents were subject to discovery. Thus, the magistrate described the plaintiffs' allegations as including, among other things, the assertion that ''Morrell, at the time it closed the [Ark City] plant, had no intention to permanently close the facility and was seeking to avoid its contractual obligations . . . and the law and to later reopen the plant under conditions more favorable to Morrell,'' and that the Union and Morrell ''covertly conspired to defraud the plaintiffs and conceal their true intent, Morrell's, to illegally rid itself of the objectional [sic] provisions of the Master Agreement[.]'' The magistrate also opined that ''there is definitive color and substance to plaintiffs' claims of fraud and conspiracy,'' and then went on to say that ''The court agrees with plaintiffs' characterization that the central and controlling issues in this case relate to the intent and motive of Morrell and the Union during 1981, 1982 and 1983 with regard to the purpose of the plant closing, whether good faith bargaining occurred and whether unfair labor practices occurred, and that the contemporaneous memos and writings (the in camera documents) prepared by Morrell and the Union, are the best evidence [indeed, the only available evidence] in ascertaining the true intent of the parties.'' The magistrate's opinion clearly indicates that documentary evidence existed that was relevant to the issue of whether Morrell's closing and reopening of the Ark

unlawful motive in September 1982. Rather, our decision must be, and is, based on what the Union reasonably should have deduced at the time the Ark City plant was reopened—not what it may, subjectively, have known or even suspected some months before. Shortly after the plant was reopened, the Union learned that it was being operated by Morrell, not by another party. Thus, even if, subjectively, Anderson believed when he drafted the handbill that Morrell intended to reopen the plants using subcontractors, the Union was under no such illusion after Ark City was reopened.

[19] The Union was, of course, on notice of the same facts when Morrell reopened its Memphis plant in September 1983, yet it filed no charge at all concerning the events in Memphis until 1987.

The General Counsel and the Union stress that the Union's 1983 and 1987 charges are different in material respects, and so they are. As we have already observed, the 1983 charge alleged that when Morrell reopened the Ark City plant it refused to recall former unit employees or to recognize the Union, and that it had made unilateral changes in terms and conditions of employment without bargaining with the Union. The 1987 charge, by contrast, alleged that Morrell's actions, including the plant closings, were part of an unlawful scheme to get rid of the Union and the Master Agreement. But the difference in the two charges does not help the Union and the General Counsel because, as we have found, the Union should have known in 1983, even without the ''smoking gun'' documents, that Morrell had devised the unlawful scheme which was the basis for the 1987 charge. Put succinctly, the Union should have filed its 1987 charge in 1983.

Chairman Stephens further observes that the Union's failure to act in a timely fashion is not excused by Morrell's misrepresentations that the plant closings were intended to be permanent or its failure to disclose that they were a necessary part of Morrell's plan to rid itself of the Union. When the Ark City plant reopened, the Union (unlike the charging parties in the cases cited by the General Counsel and the Union) had all the *operative facts* necessary to lead it to infer that such was Morrell's plan. That Morrell concealed, or even lied about, its *motive* in closing the plants is of no avail to the Union. Seldom, if ever, do employers who unlawfully retaliate against employees inform the employees of the real reasons for their actions. Instead, employers generally represent that the actions are taken for legitimate reasons. See, e.g., *Property Resources Corp. v. NLRB*, 863 F.2d 964, 968 (D.C. Cir. 1988). To hold that the 10(b) period is tolled until aggrieved employees obtain actual knowledge of the employer's unlawful motive would be, in effect, to read Sec. 10(b) out of the Act in cases in which motive is a factor. To avoid that unseemly outcome, the Board has held that the 10(b) period begins when an aggrieved employee is on notice of *facts* that should cause him to believe that his statutory rights have been violated. When motive is an element of the violation, the charge must be filed within 6 months of the time the aggrieved employee *should* infer that the employer acted out of an unlawful motive, irrespective of whether the employee has obtained actual proof of the employer's motive. *Al Bryant, Inc.*, 260 NLRB 128, 135 (1982), enfd. 711 F.2d 543 (3d Cir. 1983), cert. denied 464 U.S. 1039 (1984); *Safety-Kleen Corp.*, 279 NLRB 1117, 1119 (1986). In this case, because the Union unquestionably was aware of the operative facts by the spring of 1983, Morrell's misrepresentation of its motive does not excuse the Union's failure to file a timely charge, because the Union should have been able to discern Morrell's actual motive from the facts in its possession.

[20] *Kanakis*, supra, is distinguishable from this case. In *Kanakis*, the Regional Director dismissed a timely charge for lack of evidence, on the basis of a perjured affidavit from the respondent's president. When the true reason for the respondent's actions became known years later, the Board majority held that, under those circumstances, the respondent's fraudulent concealment of evidence from the General Counsel tolled the running of the 10(b) period. Accordingly, the Board reinstated the dismissed charge. Here, as we have noted, the Regional Director did not dismiss the Union's 1983 charge because of Morrell's misrepresentations, but simply approved the Union's request to withdraw its charge, when the Union decided it no longer wished to proceed with the case.

Chairman Stephens adheres to the views expressed in his dissent in *Kanakis*. However, even assuming that *Kanakis* was correctly decided, Chairman Stephens agrees that it does not control this case.

City plant were parts of a fraudulent scheme, as to which the magistrate had found there was ''definitive color and substance.'' Thus, even though the Union did not receive the ''smoking gun'' documents until 1987, the magistrate's opinion, which he issued in April 1986, taken together with the facts already in the Union's possession (for more than 3 years) should have alerted the Union to the possibility of skulduggery on the part of Morrell. Having failed to file a charge within 6 months of the issuance of the magistrate's opinion, the Union was precluded by Section 10(b) from reinstituting its 1983 charge and filing a new one in 1987.

For all the foregoing reasons, we find that this action is barred by Section 10(b). We therefore grant the Respondents' Motion for Summary Judgment.

ORDER

The complaint is dismissed.

IT IS FURTHER ORDERED that all references to the documents referred to as General Counsel's Exhibits M, N, and O be stricken from the General Counsel's brief, and that the General Counsel and the Union return all copies of those documents to the Respondents immediately.[21]

MEMBER DEVANEY, dissenting.

My colleagues hold that the Union's charge in this case is barred by Section 10(b). The majority concludes that the Union had ''clear and unequivocal'' notice by late March 1983 of facts from which it should have known that Morrell had closed and reopened certain of its plants as part of a plan to rid itself of the Union and its contractual responsibilities. According to my colleagues, the Union was required to file any charge related to those actions within 6 months thereafter, and because the instant charge was not filed until October 1987, my colleagues grant the Respondents' Motion for Summary Judgment. The majority also concludes that even assuming that the Union was not on notice of all the operative facts in 1983, it certainly should have known that Morrell had an illegal objective in closing its plants when a Federal magistrate in *Aguinaga v. John Morrell & Co., et al.*, No. 83–1858 (D. Kan. 1983), ruled that Morrell's ''smoking gun'' documents were subject to discovery.

I disagree.[1] A party is not entitled to summary judgment if the Board finds that the pleadings and submissions of the parties raise substantial and material issues of fact and law which may best be resolved at a hearing conducted before an administrative law judge. *Lake Charles Memorial Hospital*, 240 NLRB 1330, 1331 (1979).

In my view, there exist genuine issues of material fact and law with respect to whether the Charging Party had notice of the operative facts which would begin the running of the 10(b) period. Notably, the Union and the General Counsel assert that Section 10(b) does not bar the complaint because the Respondents fraudulently concealed their true intentions in closing and reopening the plants. The parties' pleadings sharply disagree as to when the Charging Party had notice that the closing of the Respondent's plants in 1982 was an unlawful sham to get rid of the Union and whether the 1986 *Aguinaga* opinion, supra, should have put the Charging Party on notice of Morrell's alleged unlawful scheme. These are clearly disputed material issues of fact and law which should not be resolved on a motion for summary judgment. The Charging Party is entitled to a hearing to resolve these issues, and thus I would deny the Respondents' Motion for Summary Judgment.

[21] We find no merit, however, in the Respondents' request that the General Counsel and the Union be ordered to remove from their files all references to the documents in question. (Taken literally, such an order would preclude those parties from even retaining copies of this Decision and Order.)

Consistent with our Order, we shall return to the Respondents all copies of the documents in question that are in the Board's possession.

[1] With respect to the collateral estoppel issue, I join my colleagues' findings that a substantial question of material fact exists regarding whether the issue of notice to the Union was decided in the district court proceeding, and that the collateral estoppel allegation is inappropriate for decision on a motion for summary judgment.